A

HOTEL ANIKA SDN BHD

v.

MAJLIS DAERAH KLUANG UTARA

B

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL SUIT NO: 22-24A-1997]
5 OCTOBER 2006

C ***CONTRACT:*** *Construction - Lease agreement - Contingent condition - Non-fulfilment of condition by lessor - Whether agreement incapable of performance - Whether frustrated - Whether unenforceable - Contracts Act 1950, ss. 33, 57(2)*

D ***LAND LAW:*** *Lease - Lease agreement - Rights of lessor - Subject land belonged to State Government - Lease executed in anticipation that lessor would be granted title - Failure to obtain title - Whether lessee could sue for specific performance - Whether lessor liable in damages - National Land Code, ss. 40, 41, 42*

E By an agreement dated 17 March 1991, the defendant local authority granted the plaintiff a renewable 30-year lease of a piece of land in the town of Kluang, Johore ('the said land'), for the latter to construct and manage a multi-storey car park thereon. It was not disputed that the said land, at the material time, belonged
F to the State Government. The 30-year lease aside, the agreement also provided that: (i) construction could only commence after the defendant had obtained title to the said land and approved the relevant building plan; (ii) the lease would take effect from the date of the issuance of the Certificate of Fitness for Occupation for the
G multi-storey car park by the defendant; and (iii) the plaintiff could in the meantime occupy the said land and turn it into an open-air car park. Thereafter, the plaintiff took vacant possession of the said land and turned it into an open-air car park, whilst the defendant took steps to apply for the title of the said land. The
H defendant's application for title was however rejected by the State Government, with the result that the defendant disapproved the plaintiff's building plan and advised the plaintiff to vacate the said land. The plaintiff alleged that the defendant was in breach of its obligation to obtain title, and in the circumstances applied for
I specific performance and *in lieu* thereof for damages amounting to

RM35 million. The defendant argued that it could not be liable for damages since the agreement was conditional on the grant of title to it, and consequently sought the court's endorsement of its stand.

Held (dismissing the claim):

(1) The two most important and comprehensive rules of general application in construing a written instrument are that: (i) it shall, if possible, be so interpreted *ut res valeat potius quam pereat*; and (ii) such a meaning shall be given to it as to carry out and effectuate to the fullest extent the intention of the parties. (para 32)

(2) Although, outwardly, it appeared that it was agreed that the lease "shall be effective" from the date of the Certificate of Fitness for Occupation for the multi-storey car park, for all intents and purposes, it was agreed that for the lease to be effective the defendant must first obtain the title to the said land. (para 34)

(2a) When the said agreement was entered into, the defendant had no title to the said land. Given so, it would not seem the reasonable construction, indeed wholly improbable, that the defendant could have agreed to grant a lease of land to which it has no title. The reasonable construction would be that both parties had entered into the said agreement on the assumed basis that title to the said land would be alienated to the defendant. And until then, the plaintiff was permitted to use the said land as an open-air car park (which explained the delivery of vacant possession of the said land to the plaintiff). Hence, what was agreed was a lease that would be effective if the defendant had obtained the relevant title. Without that, the lease would not be effective even if the plaintiff's building plan was approved by the defendant. (para 34)

(3) Although cl. 11 contained an undertaking by the defendant to forward the document of title, when issued, to the plaintiff for the purpose of registration of the agreed lease, there was no expressed provision that it was the obligation of the defendant to obtain the said title. Also, such an obligation could not be constructed or implied, given that the power of alienation was with the State Authority. A conclusion that the defendant had the obligation to obtain

A the title would thus flout business common sense. The more reasonable result would be that the defendant had the obligation to apply for the said land. (para 37)

(4) A contingent condition is a provision to the effect that the B contract would not take effect until the condition is fulfilled, the non-fulfilment of which does not render either party liable in damages. On the other hand, a promissory condition is an essential term of the contract, the breach of which entitles the innocent party to treat itself as discharged from C the contract and to sue for damages, except in cases where the subsisting agreement is defeated or frustrated by a supervening event (*ie*, the non-fulfilment of the promissory condition). (para 45)

D **(5)** On the true construction of the agreement read as a whole, there was no out-right lease. The lease was entirely dependent on an uncertain future event. The lease could only take effect if the defendant has obtained title to the said land. The defendant had not obtained the title, and in the upshot there was no enforceable agreement. The result E would not be any different if the requirement as to title was a promissory condition, for the said agreement was defeated or frustrated by the non-fulfilment of a requirement, namely, that the defendant must first obtain the title thereof. (para 45)

F **(5a)** The defendant had not prevented the fulfilment of the requirement nor breached the agreement. It was just that the said agreement was impossible of performance. Accordingly, the defendant could not be liable in damages. G (para 45)

Case(s) referred to:

Aberfoyle Plantations v. Khaw Bian Cheng [1960] 1 MLJ 47 ***(refd)***

Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191 ***(refd)***

H *Aspdin v. Austin [1844] 5 QB 671* ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Pekayuan Sdn Bhd & Ors [1993] 2 CLJ 495 SC ***(refd)***

BP Refinery (Westernport) Pty Ltd v. Shire of Hastings [1978] 52 AJLR 20 ***(refd)***

I *Chamber Colliery Ltd v. Twyerould (1893) [1915] 1 Ch 268* ***(refd)***

Chatenay v. The Brazilian Submarine Telegraph Co Ltd [1892] 1 QB 79 ***(refd)***

Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 FC ***(refd)***

Churchward v. R [1865] LR 1 QB 173 ***(refd)***

Datuk Yap Pak Keong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA ***(refd)***

Duke of Westminister v. Guild [1985] QB 688 ***(refd)***

Equity & Law Life Assurance Society plc v. Bodfield Ltd [1987] 281 EG 1448 ***(refd)***

Equity Corporation Sdn Bhd v. Thye Sun Quarry Sdn Bhd [2002] 6 MLJ 74 ***(refd)***

Great Western Railway v. Bristol Corpn [1918] 87 LJ Ch 414 ***(refd)***

Grey v. Pearson [1857] 6 HL Cas 61 ***(refd)***

Halimah Abdul Rahman v. Fatimah Abdullah [1976] 2 MLJ 64 ***(refd)***

Hudson v. Buck [1877] 7 Ch D 683 ***(refd)***

Ipswich Diocesan Board of Finance v. Clark (No 2) [1975] 1 WLR 468 ***(refd)***

James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583 ***(refd)***

Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 ***(refd)***

L Schuler AG v. Wickman Machine Tool Sales Ltd [1973] 2 All ER 39 ***(refd)***

Leader v. Duffy [1888] 13 App Cas 294 ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Ors [1995] 2 CLJ 713 CA ***(refd)***

Luxor (Eastborne) Ltd v. Cooper [1941] AC 108 ***(refd)***

Lynch v. Thorne [1956] 1 WLR 303 ***(refd)***

Mackay v. Dick [1881] 6 App Cas 251 ***(refd)***

Mars Equity Sdn Bhd v. Tis 'Ata'ashar Sdn Bhd [2005] 1 CLJ 513 CA ***(refd)***

Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 CLJ 236 CA ***(refd)***

Multi-Purpose Holdings Bhd v. Ketua Penqarah Hasil Dalam Negeri [1997] 4 CLJ 457 HC ***(refd)***

National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Pioneer Shipping Ltd v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***

Re Jodrell [1890] 44 Ch 590 ***(refd)***

Re Strand Music Hall Co Ltd [1865] 35 Beav 153 ***(refd)***

Reardon-Smith Line Ltd v. Ynquar Hansen – Tangen [1976] 1 WLR 989 ***(refd)***

Robertson v. French [1803] 4 East 130 ***(refd)***

SA Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co Ltd [1954] 1 WLR 492 ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Shell UK Ltd v. Lostock Garage Ltd [1976] 1 WLR 1187 ***(refd)***

A *Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206* ***(refd)***
Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA ***(refd)***
Smith v. Cooke [1891] AC 297 ***(refd)***
SPA v. Tradax Ocean Transportation [1987] All ER 81 ***(refd)***
B *Stirling v. Maitland [1864] 5 B & S 841* ***(refd)***
The Moorcock [1889] 14 PD 64 ***(refd)***
The Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(refd)***
Young and Marten Ltd v. McManus Childs Ltd [1969] 1 AC 454 ***(refd)***

C **Legislation referred to:**
Contracts Act 1950, ss. 33, 57(2), 74
Land Code (Cap 138), s. 47
National Land Code, ss. 40, 41, 42, 221(3)(a), (b)
Share (Land Based Company) Transfer Tax Act 1984, s. 5

D **Other source(s) referred to:**
Kim Lewison, *The Interpretation of Contracts*, p 225

For the plaintiff - Tommy Thomas (Allan Gomez with him); M/s Tommy Thomas
For the defendant - Abdul Razak Sharif (Asri Rais & Shafie Naim with
E *him); M/s Azman, Razak & Assocs*

Reported by WA Sharif

F **JUDGMENT**

Jeffrey Tan J:

[1] This is an action by the plaintiff for specific performance of
G the agreement dated 17 March 1991 (said agreement) and entered into between the defendant as lessor of the one part and the plaintiff as lessee of the other part, in which the defendant had allegedly agreed to grant to the plaintiff a renewable 30-year lease of the piece of land (later identified as Lot 8117) opposite the
H plaintiff's Hotel Anita and situated at Jalan Sultanah, Kluang, Johor (said land) for a multi-storey car park complex, or damages *in lieu* of specific performance.

[2] Trial proceeded without any consensus on the agreed issues
I and or agreed documents. Nevertheless, there were areas of accord. Both parties agreed to the dispensation of formal proof of the documents in their respective bundles, which were PBA(1-61)

and PBB(1-31) filed by the plaintiff, and DB(1-16) filed by the defendant. And both parties agreed to the following facts stated in encls. 90 and 90A.

1. The Defendant ("Kluang Council") is a local authority within the meaning of the Local Government Act, 1976.

2. By letter dated 1st November 1989, the Plaintiff applied to the Kluang Council for a lease of land situate in Jalan Sultanah, Kluang, Johor ("the said Land") for the purpose of developing it as a multi-storey car park complex.

3. The said land is situated opposite a hotel owned and operated by Hotel Anika. A portion of the said land was vacant in November 1989 while squatters occupied some parts of it.

4. By letter dated 20th January 1990 from the Kluang Council to the District Land Administrator, Kluang, the Kluang Council informed the District Land Administrator that the Kluang Council had decided during its meeting on 30th December 1989 to apply for a parcel of land as set out in the outline plan for the purpose of a "Temporary Occupation Licence For Temporary Car Park Site at Jalan Sultanah, Kluang". The Kluang Council further requested the cooperation of the Land Administrator to consider the application due to the shortage of car-park areas in Kluang town.

5. By letter dated 3rd October 1990, the Kluang Council informed the Director of the Johor State Economic Planning Unit, Johor Bahru ("UPEN") *"inter alia"*, that:

   (i) the Kluang Council had received an application from Hotel Anika for a lease of the said land for the purpose of building a multi storey car park area. The said land was a parcel of land that had been zoned as a car park area under the Layout Plan Bil: J5/3949;

   (ii) that the Kluang Council had agreed to Hotel Anika's application during its meeting on 24th July 1990 in view of the fact that Kluang town had an acute shortage of parking lots and that it would be very good if the private sector was interested in building a multi storied car park to accommodate the increasing number of vehicles;

(iii) that the Kluang Council had accordingly imposed upon Hotel Anika certain conditions as contained in its said letter of 3rd October 1990; and

(iv) asked for UPEN to agree to this course of action on the part of Kluang Council.

6. By letter dated 6th November 1990, the Kluang Council approved the application and agreed to grant to Hotel Anika the said land as a lease for 30 years, with an option to renew for another 30 years and on other terms and conditions contained therein.

7. Thereafter, further communications passed between the parties on the terms and conditions of the proposed lease:

(i) By letter dated 8th November 1990, Hotel Anika wrote to thank the Yang Dipertua of the Kluang Council for approving its application, but sought clarification and the Yang Dipertua's consideration on the rental payments for the duration of the lease and some of the other conditions stated in the Kluang Council's letter of 6th November 1990. Hotel Anika also enclosed their BBMB Cheque No. 040702 for the sum of RM5,000.00 and made out to the Kluang Council pursuant to the terms of the Kluang Council's letter dated 6th November 1990;

(ii) By letter dated 3rd March 1991, the Kluang Council informed Messrs A. Rahim & Co. that the draft agreement was to be amended, and pursuant to the directions of the Yang Dipertua of the Kluang Council the rental was to be for the sum of RM1,000.00 per month;

(iii) By letter dated 17th March 1991, the Kluang Council informed Messrs A. Rahim & Co. that the draft agreements were studied during the Council's meeting on 16th March 1991, and the Council had decided to amend the rental amounts to RM5,000 per annum for the first two years and thereafter at RM1,000 per month from the 3rd year onwards.

8. By a Lease Agreement dated 17th March 1991, and duly executed by the parties, Kluang Council agreed to lease the said land to Hotel Anika for 30 years, with an option to renew for a further period of 30 years. The principal terms and conditions of the said Lease Agreement included:

(i) Vacant possession of the said land would be delivered to Hotel Anika for use by the latter as an open-air car park, and Hotel Anika agreed to pay Kluang Council an annual rental of RM5,000.00 for the first 2 years and thereafter at RM1,000 per month from the 3rd year onwards.

(ii) Hotel Anika shall, at its costs and expense, construct a multi-storey car-park complex on the said land.

(iii) Hotel Anika shall be entitled to retain rental and all other income generated from the car park complex.

(iv) Hotel Anika would submit building plans to Kluang Council in respect of the proposed development on the said land.

(v) Upon issuance of title to the said land by the relevant authority, the parties shall execute and cause to be registered in the land office a registered lease pursuant to the terms of Section 221 of the National Land Code, 1965.

(vi) Upon the expiry of the lease period of 60 years, the said land, together with the car park complex, shall be handed to the Kluang Council whose property it shall become.

9. By two letters dated 31st March 1991, Kluang Council informed Hotel Anika that it had taken the necessary steps to set in motion the granting of the said land to Kluang Council.

10. Pursuant to the Lease Agreement, Hotel Anika (through its Architect) by cover of letter dated 16th September 1991, submitted to Kluang Council building plans seeking approval of the construction of the car park complex on the said land.

11. Pursuant to the Lease Agreement, Kluang Council assisted Hotel Anika in the survey in the numbers of squatters and that part of the said land which was not occupied by squatters was thereafter delivered to Hotel Anika for the purpose of utilisation as an open-air car park.

12. Pursuant to the Lease Agreement, Hotel Anika, at its own expense, fenced the open-air car park after vacant possession of the said land was delivered to it, laid tarmac over it and used it as a temporary open-air car park.

13. By letters dated 21st December 1994, 22nd December 1994 and 6th January 1995, the Land Administrator's Office and Kluang Council demanded that Hotel Anika vacate the said land which had been utilised as an open-air car park.

14. The 7 shop-houses constructed by Ju-Ichi Enterprise Sdn Bhd ("Ju-Ichi") in Phase 1 on 50,000.00 square feet of land which is the subject matter of this suit ("the said land") had been sold for about RM800,000.00 each in or about 1998.

15. The 9 shop-houses constructed by Ju-Ichi in Phase 11 on the said land are currently (2004) being offered for sale at RM1,000,000.00 each.

16. The said land was alienated to Ju-Ichi as a 99 year lease, and Ju-Ichi has applied for individual documents of title for each of the 16 units, but no titles have been issued by the authorities as yet.

[3] As said, trial proceeded without consensus on the agreed issues and or agreed documents. But in the midst of the testimony of PW1, both Mr. Tommy Thomas for the plaintiff and Mr. Asri bin Rais for the defendant, proclaimed that the bone of contention was the construction of cls. 3, 4, and 5 of the said agreement which reads as follows.

Lease Agreement

AN AGREEMENT made this 17th day of March 1991 between MAJLIS DAERAH KLUANG UTARA, a local authority whose office is at Jalan Pejabat Kerajaan, 86000 Kluang, Johore (hereinafter called 'the Lessor') and HOTEL ANIKA SDN BHD., a company incorporated in Malaysia with its registered office at Nos 1, 3 & 5, Jalan Dato Rauf, 86000 Kluang, Johore (hereinafter called 'the Lessee').

WHEREAS a piece of land located along Jalan Sultanah, Kluang directly opposite Hotel Anika as indicated in the sketch plan attached herewith and is to be read in conjunction with Pelan Perancang J5/3949 of which has been earmarked by the Lessor as a 'car-park' reserve (hereinafter referred to as 'the said piece of land').

AND WHEREAS the Lessor do hereby agree to lease out the said land for the purpose of erecting, construction and operating a multi-storey car-park together with food stalls and other purposes pertaining thereto, subject to the terms and conditions hereinafter contained and agreed upon by both parties.

Now It Is Hereby Agreed As Follows:

1. The Lessor agrees to lease out the said piece of land and the Lessee agrees to lease it from the Lessor for a period of thirty (30) years with an optional renewal for another thirty (30) years. Commencement of the lease shall be effective from the date the Certificate of Fitness for Occupation for the multi-storey car-park is issued by the Lessor. However, the Lessor allows and authorises the Lessee to collect rental from the open-air car park upon vacant possession being given to the Lessee. Payment of rental to the Lessor at $5,000.00 per annum for the first two (2) years shall commence from the date when vacant possession of the said Land is given to the Lessee and thereafter at $1,000.00 per month, during the third year onwards.

2. Both parties hereby agree to a 10% increase in rental after every five (5) years term over the first thirty (30) years lease. Upon completion of the first thirty (30) years, the Lessor will extend the lease for another thirty (30) years under the same terms and conditions, with the exception of the rental, whereby the rental per annum thereafter shall not exceed 100% of the last annual rental of the first thirty (30) years.

3. The Lessee shall not erect any building or structure on the said piece of land until the Lessor has obtained the title deed from the relevant Authority. In the meantime, the Lessor shall allow the Lessee to occupy the said piece of land and utilise it as an open air car park.

4. The Lessee shall at their own cost and expenses submit and obtain the approval of the building plans from the Lessor after the issuance of the title deed. Construction work for the proposed multi-storey car park complex shall commence only after the Lessee has obtained approval of the building plans from the Lessor.

5. The Lessee shall at their own cost and expenses, develop the proposed multi-storey car park complex. The Lessee shall be authorised to collect whatever revenue or rental income generated by the proposed complex. All businesses carried out in the proposed complex shall be referred to the Lessor for the purpose of licensing before commencement of business.

6. The Lessor shall be responsible for the eviction of the squatters, clearing of the land and the assurance that the land be free of any encumbrances. The Lessee shall bear all costs and expenses incurred in the eviction of the squatters, both the Lessor and Lessee shall discuss to determine the quantum of compensation. The Lessor shall have no authority whatsoever to determine the expenses incurred and also the quantum of compensation without the prior consent of the Lesses.

7. The Lessor shall pay the quit rent of the said piece of land while the Lessee shall pay the assessment of the building thereon during the tenure of the lease.

8. The Lessee shall provide for the management and administration, maintenance and upkeep of the complex at their own cost.

9. The Lessee shall provide sufficient insurance coverage to protect the property.

10. The Lessee has agreed that on the completion of the Sixty (60) years lease, the land together with the building thereon shall be handed-over to the Lessor and thereafter, shall remain the properties of the Lessor.

11. Under Section 221 of the National land Code, a lease is to be registered with the relevant Land Office. As the document of title to the said land has yet to be issued by the Commissioner of Lands and Mines, Johore Bahru to the Lessor, the Lessor undertakes to forward the said title to the Lessee or their solicitors for the purpose of registration of the said lease and upon its completion, the Lessee or their solicitors undertake to return the same to the Lessor for custody. All legal charges shall be borne and paid by the Lessee.

12. Time wherever mentioned herein shall be in the essence of this agreement.

13. Any notice required to be given shall be in writing and shall be sufficiently served on the respective parties or their solicitors.

AS WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

SIGNED BY MAJLIS DAERAH KLUANG UTARA ('The Lessor') in the presence of:	)))	
t.t. Setiausaha Majlis Daerah Kluang Utara Kluang	)))	t.t Yang Dipertua Majlis Daerah Kluang Utara Kluang
The Common Seal of HOTEL ANIKA SDN BHD ('The Lessee') was affixed in the presence of:	))))	
DIRECTOR		DIRECTOR

[4] In relation to the oral evidence, Fong Wan (PW1) testified that he was a director and a shareholder of the plaintiff. The rest of his testimony may be paraphrased as follows. The plaintiff was incorporated in 1984 and belonged to his family. The plaintiff's only business was a hotel, Hotel Anika, erected in 1983, at Jalan Sultanah, Kluang. In 1989, one Dato' Johari bin Suratman, who was the Yang DiPertua of Kluang and whom he knew, invited him to apply for a car park. Dato' Johari pointed to the land in front of Hotel Anika as that car park. PBA(1 & 2) was the plaintiff's application for the land opposite Hotel Anika as a car park, pursuant to the invitation of Dato' Johari. The signature on PBA(2) was his signature. PBA(4 & 5) was the agreement from the defendant to the plaintiff. The said agreement was executed on 17 March 1991. PBA(12) was the payment towards the rental for the first year. The plaintiff received PBA(35). PBA(37) was the defendant's application to the land office for the (alienation of the) said land. Robert S.C. Chew was the architect appointed by the plaintiff for the car park project. PBA(40) was the letter of Robert Chew submitting the building plans for approval. In 1991, about three months after execution of the said agreement, the defendant delivered possession of the said land to the plaintiff. There were about 5-7 wooden houses on the said land. He converted the unoccupied portion of the said land into (an open air) car park. PBB(24-31) were the (proposed building) plans for a 5-storey car park cum shops and shopping emporium. PBB(10-21) was his projected profits for 30 years. The signature on the left of PBB(20) was his, while the signature on the right was that of his manager. "Kerugian yang saya tuntut adalah seperti di dalam PBB(10-21) iaitu wang sebanyak RM11,040,000 untuk 30 tahun dan sebanyak RM35,326,000 untuk 60 tahun. PBB(22) adalah

breakdown untuk revenue."

[5] Under cross-examination, PW1 said that he did not know that the said land was state land. He knew that the said land was the property of the defendant. However, PW1 said that he received PBA(4) and he knew that the (car park complex) could not be built before the document of title had been first obtained by the defendant from the state government. He knew that he could not carry out any development and could not obtain any approval for the building plans before the document of title had been first obtained – "Saya setuju, sebelum geran di perolehi, saya tidak boleh membuat dan memperolehi pelan-pelan bangunan untuk kelulusan". He did not receive any receipt for the payment tendered in PBA(12). He did not know that the cheque tendered in PBA(12) was not presented for payment. Other than PBA(12), he had not made any other payments towards the rent. His building plans had not been approved. The defendant did not inform him that the application for a title to the said land had not been approved. PBB(10-21) was only an estimate (of the expected revenue). To the suggestion of learned defence counsel that the damages stated in PBB(10-12) would not be realised if the building plans were not approved ("Saya katakan, jika pelan bangunan tidak dibuat, gantirugi seperti PBB(10-22) tidak wujud"), PW1 answered that it was not within his power to determine whether the plans would be approved ("Samada pelan diluluskan tidaklah kuasa saya"). PW1 was not re-examined.

[6] The only other witness for the plaintiff was Chan Wai Chew (PW2), the Project Executive of Syarikat Fong Wai General Construction Sdn. Bhd., who testified that between 1983 and 2003 he was employed by one of the companies of PW1. "Saya tidak mempunyai kelayakan professional dalam mana-mana bidang. Saya cuma ada pengalaman. Tandatangan kanan di ms PBB(20) adalah tandatangan saya." He assisted in the preparation of PBB(10-22). "Maklumat dalam PBB(10-27) dibuat oleh saya, dan di dalam pengetahuan saya, Kalau tidak ada restaurant, kedai-kedai dan emporium, bilangan tempat letak kereta akan naik atau bertambah lebih kurang 150 unit." The proposed shops and emporium were just a proposal subject to formal approval. "Dalam pengetahuan saya, sepanjang saya bekerja dengan SP1, ada pelan-pelan dari SP1 untuk projek-projek diarah oleh Pejabat Daerah dipinda."

[7] Under cross-examination, PW2 said that to date (meaning 10 September 2003) there was no official response to the plans in PBB(24 -31). The said land is presently used as a public park and towards roads. To the suggestion by learned counsel that the building plans had been rejected, PW2 answered that the defendant had not replied to the plaintiff. There could be 321 parking bays on the 2nd, 3rd and 4th floors of the car park, meaning that there could be 107 parking bays on each floor. The food stalls would occupy half a floor. Without the shops and emporium, the number of parking bays would increase by about 150.

[8] Under re-examination, PW2 said that the said land measured approximately 50,000 square feet. 15,000 square feet had been converted into a public park. "Baki digunakan sebagai jalan dan juga bangunan-bangunan 4 tingkat, yang dibina oleh Ju-Ichi Enterprise Sdn. Bhd. Ada lebih kurang 6-7 bangunan 4 tingkat yang sudah siap dan diduduki oleh penghuni-penghuni."

[9] Hassan bin Othman (DW1), the first of 5 witnesses for the defendant, testified as follows. He was a General Technical Assistant of the defendant. One of his duties was to process building plans. He received 6 sets of those building plans in PBB(24-31). He processed those building plans. Those plans were not approved as the land in question was still state land. Under cross-examination, DW1 said that he was aware of the said agreement when he processed those building plans. He forwarded a set of those building plans to the land office, Public Works Department, Fire Department and to other departments. He cross-checked those building plans with the Uniform Building By-laws. "Saya setuju dengan bangunan letak kereta plaintiff. Saya tidak tahu ada tanggungjawab defendan untuk mendapat hakmilik untuk tapak itu. Mesyuarat penuh defendan yang menolak permohonan pelan bangunan plaintiff." He was not aware if the defendant had taken other factors into consideration in rejecting those building plans. In 1994, Ju-Ichi made an application to erect shops on the said land. He processed that application of Ju-Ichi. The application of Ju-Ichi was made after the application of the plaintiff had been rejected by the defendant. The defendant approved the plan submitted by Ju-Ichi who then erected buildings

on the said land. "Saya sendiri tidak tahu alasan untuk luluskan permohonan (Ju-Ichi)." He was not personally involved in the processing of the approval for the 2nd phase of works by Ju-Ichi. He did not know if the defendant had applied to the state government for a document of title to be issued to the plaintiff. DW1 was not re-examined.

[10] Mahat bin Selamat (DW2), an assistant accountant of the defendant, testified that the cheque in PBA(12) was not presented for payment, because of the absence of a code bar for the receipt of that cheque. DW2 was not cross-examined.

[11] Md. Tamrin bin Aliman (DW3) said that in 1996 he was the secretary of the defendant. He signed the letter in DB(11). When the said agreement was entered into, the said land was state land then earmarked for a car park. "Saya tulis DB(11) untuk memaklumkan bahawa ada understanding untuk membangunkan tanah tersebut oleh Anika, tetapi sebab tanah tersebut adalah tanah kerajaan adalah kuasa kerajaan untuk menentukan pembangunan itu. Itu satu sebab surat DB(11) ditulis. Majlis ada pohon tanah tersebut diberikan kepada Majlis. Majlis ada memaklumkan perkembangan kepada Anika. Surat DB(10) adalah surat tersebut. Tetapi melalui DB(16) kerajaan memberitahu tanah tersebut telah diluluskan untuk projek penswastaan. Itu bermakna tanah tersebut tidak boleh dimaju seperti di dalam (said agreement)."

[12] Under cross-examination, DW3 said that he had been with the defendant since 1995. In 1991, he was not the secretary of the defendant. There was no reply to DB(11). Since December 1996, he was no longer with the defendant. He was not aware if there were an application by the defendant to obtain an alternative plot of land. DW3 was not re-examined.

[13] The next witness for the defendant was Abdul Rahim bin Al Hadad (DW4), an advocate & solicitor who commenced legal practice in 1985 and who testified that he prepared the said agreement in PBA(19-26) and PBA(27-34). "Semasa perjanjian tersebut dicapai, tanah tersebut adalah masih tanah Kerajaan Negeri Johor." DW4 was not cross-examined.

[14] Dato' Johari bin Suratman (DW5) testified that in 1991 he was the district officer of the Kluang District and also the Yang Di Pertua Majlis. On 17 March 1991, he executed the said agreement on behalf of the defendant. At that material time, the said land was state land. He had informed the plaintiff of the status of the said land. He signed the application (DB(2-3)) of the defendant to the State for the lease of the said land.

[15] Under cross-examination, DW5 said that he was the Yang DiPertua Majlis Daerah Kluang Utara from 1985 to 1996. "Jawatan itu adalah yang tinggi dalam Majlis." DW5 denied that in 1989 he invited the plaintiff to apply for the said land as a car park. In 1991, he knew PW1. The defendant received the plaintiff's application (PBA(1 & 2)) for the said land. On 20 January 1990, the defendant wrote DB(1). On 3 October 1990, he wrote DB(2-3). He wrote PBA (4) to the plaintiff. "PBA(19-34) ditandatangani dihadapan Majlis Mesyuarat Penuh." On 17 March 1991, the defendant had not received any reply to DB(2) from the State. "Saya tak ingat samada permohonan selanjutnya untuk tanah tersebut selepas perjanjian dicapai. Saya buat PBA(35) & PBA (37) selepas perjanjian." The defendant received the plans (PBA(40)) submitted. He could not remember whether the defendant had assisted the plaintiff to evict the squatters on the said land or whether the plaintiff had fenced up a portion of the said land. He signed PBA(49), in which he meant to say that a car park would also be erected by Ju-Ichi. Ju-Ichi did not erect a car park. Asked by learned counsel for the reason why Ju-Ichi had not erected the car park, DW5 answered, "Kelulusan kerajaan adalah bukan bidang kuasa Majlis". DW5 agreed that on the basis of DB(14), even on 13 May 1997 the Johore Economic Planning Unit State was not opposed to the erection of a car park on the said land. Asked by learned counsel on the steps taken by Ju-Ichi to construct the car park in the light of PBA(49) and DB(14), DW5 answered, "Mengikut surat-surat tersebut cadangan tidak berubah, tetapi saya tidak tahu apakah langkah diambil". He was not aware of the date when Ju-Ichi was permitted to construct shop houses instead of a car park. He played no part in the decision to allow Ju-Ichi to construct those shop houses. Asked by learned counsel as to whether there was an appeal to the Johore Government to honour the said agreement, DW5 answered, "Melalui surat yang tadi disebutkan". The defendant was aware of the shortage of parking bays in Kluang. The defendant was not involved in the selection of Ju-Ichi. DW5 was not re-examined.

[16] Mr. Mohd. Razak bin Sharif, then counsel for the defendant submitted that the pertinent issue is whether the terms of the said agreement could be performed by the plaintiff and defendant. The said land belonged to the State and not to the defendant (counsel referred to DB 16). Clause 3 of the said agreement provided that the plaintiff could not construct any building unless title to the said land had been first obtained by the defendant. "Isu disini, adalah samada plaintiff tahu tanah dimiliki oleh kerajaan Johor." PW1 denied that he had knowledge that the said land belonged to the State. PW1 agreed that building could not be constructed before title to the said land had been first obtained. The plaintiff knew that the said land belonged to the State. PBA(4) was the letter of the defendant to the plaintiff before the execution of the said agreement. Paragraph 4 of PBA(4) stated that building works could not be commenced. "Kesimpulannya, plaintiff tahu tanah adalah milik kerajaan Johor." In cl. 3 of PBA(8), the plaintiff acknowledged that the said land was state land. "Persoalan disini, samada defendan mempunyai kuasa penuh untuk melupuskan, sedangkan tanah dimiliki oleh kerajaan Johor." Clauses 3 and 11 of the said agreement impliedly required the defendant to apply for the said land from the State. By letter in DB(2 & 3), the defendant had taken the steps to obtain title to the said land. The proposed car park of the plaintiff was subject to the said land being obtained from the State, and to the building plans of the plaintiff being approved by the defendant. But the building plans of the plaintiff were not approved. The claim for damages was based on a completed car park. But there was no completed car park, and the claim could not be based on a completed car park.

[17] Mr. Tommy Thomas contended that it was the obligation of the defendant to obtain title to the said land. By cls. 3 & 11 of the said agreement, it was understood that the defendant would obtain a document of title. DB(2) was not a step taken towards performance of the said agreement, as the said agreement had yet not come into being. That the said land was not the property of the defendant at the material time was not a helpful defence. That the plaintiff knew that the land belonged to the state is not in dispute, but it was the obligation of the defendant to obtain the title. In fact, title was obtained by a third party (counsel referred to PBA(49)). In DB(16), the plaintiff was informed that the said land had been given for development on 19 January 1998. There

was no evidence as to how Ju-Ichi obtained the land for development. No time was stated for performance, and time for performance is not relevant in instant case.

On damages, counsel referred to s. 74 of the Contracts Act and to *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Pekayuan Sdn Bhd & Ors* [1993] 2 CLJ 495. PBB(10) is the projected profits from the operation of the car park, food stall, and shopping arcade. The court could strike down the number of years for damages. The court could fix the multiplier as it sees reasonable. The total sales proceeds obtained by Ju-Ichi could be about RM$14.6 million (see agreed facts 15 & 16). The plaintiff would accept the profits derived from the sale of the 16 units erected on the said land less the costs of land which would be about 30% of RM14.6 million.

[18] Mr. Shafie bin Naim replied for the defendant that the quantum of damages must be proved on a balance of probabilities. The claimed damages are based on an approved multi-storey car park, but there is no approved multi-storey car park. "Sebab itu saya kata gantirugi yang tertakluk pada approved multi-storey car park tidak wajar." At best, damages could only be based on an open car park. Until approval of the lease, what was provided was an open car park. "Pajakan bermula sekiranya OC bagi car park diperolehi. Namun demikian, pajakan defendan belum bermula. Sebelum OC defendan cuma membenarkan plaintiff mengutip hasil dalam aktiviti car park. Namun demikian, plaintiff hanya boleh menuntut hasil bagi open car park. Dalam keterangan beliau, SP1 bersetuju bahawa car park tidak akan dibina sehingga hakmilik diperolehi dari kerajaan – sila lihat ms 10. Akhirnya, hakmilik dikeluarkan, tetapi kepada Juichi, dan tidak perlu terus kepada defendan. Provision untuk open car park adalah untuk tempoh sementara. Maksud tempoh sementara bukanlah 60 tahun ataupun 30 tahun tetapi untuk tempoh yang munasabah. Tempoh yang munasabah disini adalah tertakluk kepada faktor-faktor. Disitu defendan memohon tanah pada 20 Mac 1991, dan permohonan ditolak pada sekitar Disember 94, sebab tanah diberikan kepada Juichi pada Ogos 94 (sila lihat PBA(49)) atau Disember 1994 (Sila lihat PBA(57))." Damages should be based on an open air car park for 3 1/2 years. According to PBB(13), each floor could accommodate 107 cars. The projected income for 3 floors per annum on 50% occupancy rate is RM562,392. That was based

on 80 cents per hour. The prevailing rate permitted by the defendant was 60 cents. All awards should be based on the above.

[19] Mr. Allan Gomez answered for the plaintiff that the 30 years lease would commence from the issuance of the certificate of fitness of occupation of the multi-storey car park. "But the agreement was contingent upon issuance of OC." Had the defendant performed that duty, there could be a renewable 30 years lease. Therefore, the plaintiff is entitled to claim for the entire 60 years.

[20] What was agreed must be resolved by the proper interpretation or construction of the said agreement.

The process of interpretation starts by a consideration of the language used by the parties in the document itself. That consideration of the language is to ascertain the meaning of the words in the document and to determine (subject to any rule of law) the legal effect or the effect to be given to those words (see *Chatenay v. The Brazilian Submarine Telegraph Co., Ltd.* [1892] 1 QB 79), so as to ascertain further "... the mutual intentions of the parties ... as to the legal obligations each assumed by the contractual words in which they sought to express them" (*Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd* [1982] AC 724 per Lord Diplock). The intention of parties is strictly the meaning of the words they have used. "The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion" (*Great Western Railway v. Bristol Corpn* [1918] 87 LJ Ch 414 per Lord Shaw). Thus, in *Re Jodrell* [1890] 44 Ch 590, Lord Halsbury said:

> I do not know what the testator meant except by the words he has used ... For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document and not to part of it; and having looked at the whole of the document to see, if I can, through the document what was in the mind of the testator. Those are general principles for the construction of all instruments and to that extent it may be said that they are canons of construction.

[21] The language used must be considered in the light of the surrounding circumstances and the objects of the contract, in so far as it has been agreed or proved. But it would be erroneous to assume an intention apart from the language used in the

instrument and bend the language in favour of the assumed intention (*Leader v. Duffy* [1888] 13 App. Cas. 294), "to construe an instrument contrary to what the words of the instrument itself convey" (*Smith v. Cooke* [1891] AC 297 per Lord Halsbury), "to introduce uncertainty by starting from the viewpoint of a general rule governing such clauses, and then to resolve the question of construction by reference to it ... (as it is) the court's task is to determine the meaning of the provision, against its contractual and contextual sense" (*S.p.A. v. Tradax Ocean Transportation* [1987] All ER 81), or "to construe and apply not the clause which the parties have entered into but the different clause which they might have ... entered into" (*Equity & Law Life Assurance Society plc v. Bodfield Ltd* [1987] 281 EG 1448).

[22] In attempting to ascertain the presumed intention of the parties, the court will adopt an objective approach, that is to say that it will consider what would have been the intention of reasonable persons in the position of the actual parties to the contract. Thus in *L Schuler AG v. Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39, 53, Lord Wilberforce said:

> ... subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive.

And in *Reardon-Smith Line Ltd v. Ynquar Hansen – Tangen* [1976] 1 WLR 989, Lord Wilberforce again said:

> When one speaks of the intention of the parties to the contract one speaks objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.

[23] The court is entitled to look at evidence of the actual factual background known to the parties at or before the date of the contract; accordingly, evidence of the surrounding circumstances (*Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon* [1994] 1 CLJ 1), of the "genesis" and of the "aim" of the transaction, limited however to objective facts, to place the contract in its correct setting – the

factual matrix is – admissible. Regard must be had to the surrounding circumstances (see *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11). Thus in *Ipswich Diocesan Board of Finance v. Clark (No. 2)* [1975] 1 WLR 468, Sir John Pennycuick, delivering the judgment of the English Court of Appeal, said:

> It is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression on such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.

[24] However, the court may not look at the subsequent conduct of the parties to interpret a written contract unless that conduct amounted to a variation of the contract or gave rise to an estoppel (*James Miller and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; see also *Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 CLJ 236).

[25] Words are construed, in their grammatical and ordinary sense, unless that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid that absurdity and inconsistency, but no further (*Grey v. Pearson* [1857] 6 HL Cas 61 per Lord Wensleydale); the ordinary meaning of a word is its meaning in its plain, ordinary and popular sense, unless the context points out some special and particular sense (*Robertson v. French* [1803] 4 East 130). In the case of a word with both an ordinary and a specialised meaning, the popular meaning will prevail unless it is proved first that the parties intended to use the word in the specialised sense.

[26] There is a general presumption against implying terms into written contracts. Rather, the presumption is that parties who have entered into written engagements with written stipulations have expressed all the conditions by which they intended to be bound under the instrument (*Aspdin v. Austin* [1844] 5 QB 671; *Luxor (Eastborne) Ltd v. Cooper* [1941] AC 108) and care must be taken not to make a contract speak where it was intentionally silent (*Churchward v. R* [1865] LR 1 QB 173). The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain (*Duke of Westminister v. Guild* [1985] QB 688).

[27] Where the bargain is obviously not complete, the court may imply the missing terms if the following criteria (some of which may overlap) set by Lord Simon of Glaisdale in *B.P Refinery (Westernport) Pty Ltd v. Shire of Hastings* [1978] 52 AJLR 20 are fulfilled: (i) if it is reasonable (*Young and Marten Ltd v. McManus Childs Ltd* ([1969] 1 AC 454) and equitable (*B.P Refinery (Westernport) Pty. Ltd v. Shire of Hastings* [1978] 52 AJLR 20), (ii) if it is necessary to give business efficacy to the contract (*The Moorcock* [1889] 14 PD 64), (iii) if it is obvious (*Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206), (iv) if it is capable of clear expression (*Shell U.K. Ltd v. Lostock Garage Ltd* [1976] 1 WLR 1187) and (v) if it is not inconsistent with the express terms of the contract or its general tenor (*Lynch v. Thorne* [1956] 1 WLR 303).

[28] And a court, subject to the qualification that there is absent a contrary intention, would be more ready to imply a term in cases "where a special relationship such as those recognised by the law exists" (eg, banker and client, employer and employee, principal and agent, vendor and purchaser of immovable property, landlord and tenant) than in cases where no such special relationship exists (*Datuk Yap Pak Keong v. Sababumi (Sandakan) Sdn. Bhd.* [1997] 1 CLJ 23 at 54, per Gopal Sri Ram JCA).

[29] At any rate, in general, a term is necessarily implied in a contract that neither party shall actively prevent the other from performing it, which itself is a breach of the contract. The classic formulation of that implied term is that of Cockburn CJ in *Stirling v. Maitland* [1864] 5 B & S 841:

> I look on the law to be that if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative.

[30] There is also imposed on parties a general duty to co-operate in the performance of a contract. The duty includes a duty not to prevent the fulfilment of conditions see (*Mackay v. Dick* [1881] 6 App. Cas 251, where the buyer refused to give a machine a proper trial, and the House of Lords held it was a breach of contract) and to act *bona fide* (perhaps reasonably),

where the condition to be fulfilled is one which is dependent on the discretion of one party to the contract, to procure the fulfilment of the condition (*Hudson v. Buck* [1877] 7 Ch D 683).

[31] To arrive at the true interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document (*Chamber Colliery Ltd v. Twyerould* [1893] [1915] 1 Ch 268; *Re: Jodrell (supra)*). As a corollary of the principle that a document must be construed as a whole, all parts of it must be given effect where possible (*Re Strand Music Hall Co. Ltd* [1865] 35 Beav 153) and no part of it should be treated as inoperative or surplus (*S.A. Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co. Ltd* [1954] 1 WLR 492) unless it is impossible to reconcile it with another and more express clause in the same deed *(Re Strand Music Hall Co. Ltd (supra))*.

In *The Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37, Lim Beng Choon J summarised the general principles as follows:

> In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v. Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
>
> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
>
> In *Central Bank of India v. Hartford Fire Insurance Co Ltd* AIR [1965] SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[32] But the two most important and comprehensive rules of general application in construing a written instrument are, (i) that it shall, if possible, be so interpreted *ut res valeat potius quam pereat,* and, (ii) that such a meaning shall be given to it as to carry out and effectuate to the fullest extent the intention of the parties. Put together, *benigne faciendae sunt interpretationes ut res magis valeat quam pereat,* the rule is that a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. Every document ought to be construed, if possible, so as to make it operative. "It boils down to this. Where a contract is couched in unambiguous language, the court must give effect to it. But where the terms of a contract are ambiguous then the court may imply a term in order to uphold the transaction" (*Datuk Yap Pak Keong v. Sababumi (supra)* at 53 per Gopal Sri Ram JCA).

[33] It is an agreed fact (see agreed fact 8), and indeed it was so stipulated in the said agreement that the "(defendant) agrees to lease out the said piece of land and the (plaintiff) agrees to lease it from the lessor for a period of thirty (30) years with an optional renewal for another thirty (30) years" (first limb of cl. 1 of the said agreement). But that agreed fact 8 or 1st limb of cl. 1 was not the entire agreement between the parties. It is an agreed fact (agreed fact 6) that the defendant "agreed to grant to (the plaintiff) the said land as a lease for 30 years, with an option to renew for another 30 years and on other terms and conditions" set out in the defendant's letter dated 6 November 1990 (PBA(4-5)). That the agreed lease was upon such other terms and conditions was also clearly stated in the 2nd recital to the said agreement, which reads "AND WHEREAS the (defendant) do hereby agree to lease out the said land for the purpose of erecting, construction and operating a multi-storey car-park together with food stalls and other purposes pertaining thereto,

subject to the terms and conditions hereinafter contained and agreed upon by both parties" (see *Luggage Distributors (M) Sdn Bhd. v. Tan Hor Teng & Ors* [1995] 2 CLJ 713, where Gopal Sri Ram JCA said, "it is a cardinal rule in the interpretations of contracts that recitals may be taken into account as an aid to construction ... the court may construe a recital as carrying with it an obligation to carry into effect that which is recited"; see also *The Interpretation of Contracts* by Kim Lewison at 225). Quite evidently, it was agreed that the 1st limb of cl. 1 was subject to and or qualified by the other terms and conditions of the said agreement.

[34] And there were other terms and or conditions that touched upon the 1st limb of cl. 1. The 2nd limb of cl. 1 stipulated that the "Commencement of the lease shall be effective from the date the Certificate of Fitness for Occupation for the multi-storey car-park is issued by the (defendant)", while cl. 3 stipulated that the plaintiff "shall not erect any building or structure on the said piece of land until the (defendant) has obtained the title deed from the relevant authority" but shall in the meantime, meaning until the defendant has obtained the title to the said land, "occupy the said piece of land and utilise it as an open air car park" and cl. 4 further stipulated that "construction work for the proposed multi-storey car park complex shall commence only after the (plaintiff) has obtained approval of the building plans (for the multi-story car-park) from the (defendant). Thus, it was agreed that the said lease "shall be effective" from the date of the certificate of fitness for occupation of the multi-storey car-park, and that construction of the multi-storey car-park could only commence after the defendant has obtained title to the said land and the plaintiff has obtained building approval from the defendant. Outwardly, it could appear that it was agreed that the lease "shall be effective" from the date of the Certificate of Fitness for Occupation for the multi-storey car-park. But for all intents and purposes, it was agreed that for the lease to be effective the defendant must first obtained the title to the said land. Construction of the car-park could not commence if the defendant has not obtained the title, and without commencement of construction there could be no question of a Certificate of Fitness for Occupation for the multi-storey car-park. The lease would only fall into place if the defendant has obtained the title to the said land. The plaintiff could submit and the defendant could approve the plaintiff's building plans. But the lease was hinged upon the title to the said land. And that would seem

the reasonable construction, as it is axiomatic that the defendant must first be the proprietor in order to be the lessor of any land. Clause 11 of the said agreement provided that the intended lease shall be registered under the National Land Code, which could only come about if the defendant were in possession of the title to the said land. But when the said agreement was entered into, the defendant had no title to the said land, a fact that the plaintiff clearly acknowledged, as cl. 11 of the said agreement plainly stated that title to the said land had yet to be "issued" to the defendant. Given so, it would not seem the reasonable construction, indeed wholly improbable, that the defendant could have agreed to grant a lease of land to which it would have no title to. Rather, it would seem the reasonable construction that both parties had entered into the said, agreement on the assumed basis that the said land would be alienated to the defendant. And until then, the plaintiff was permitted to use the said land as an open-air car-park, which was not the object of the said agreement but was only an interim arrangement. Vacant possession of the said land was agreed to be given only for the purpose of an open-air car-park, a fact clearly acknowledged by the plaintiff in its letter dated 6 February 1994 (PBA(43)). In the final analysis, what was agreed was a lease that would be effective if the defendant has obtained the title to the said land. The lease would not be effective even if the building plans submitted by the plaintiff were approved by the defendant. Never was it at the stage for the submission and or approval of building plans, let alone the commencement of building works.

[35] In the order of the reciprocal promises, the defendant must first obtain the title to the said land. And towards that end, the defendant (i) had on 20 January 1990 (see DB(1) and or agreed fact 4) resolved to apply for a Temporary Occupation Licence of the said land, (ii) had on 3 October 1990 (see DB(2)) informed the Director of the Johore State Economic Planning Unit that the defendant had received and agreed to the plaintiff's application for a lease of the said land to erect a multi-storey car-park, and had on the same day applied (see DB(4)) to the director of the Johore State Economic Planning Unit for the said land, (iii) had on 31 March 1991 (see PBA(38)) informed the Kluang District Land Administrator that the defendant had agreed to the erection of a multi-story car park complex on the said land by the plaintiff, and (iv) had on 11 April 1991 provided to the Director of the Johore

State Economic Planning Unit further information on the proposed car-park. It could not be said that the plaintiff had not taken any steps to apply for the said land.

[36] Neither could it be said that the plaintiff had prevented the performance of the agreement. It is not clear when it became apparent to the parties that the said land would not be alienated to the defendant. At any rate, on 5 August 1994 (see PBA(50)), the defendant informed the plaintiff that the state government under its privatisation project had approved the said land to Ju-Ichi for development which would include a multi-storey car-park, and that the defendant would "consider handing" over the multi-storey car-park to the defendant. Thereafter, by letters dated 21 December 1994, 22 December 1994 and 6 January 1995 (see PBA(56), PBA(58) and PBA(60)), the defendant gave notice to the plaintiff to vacate the said land. There is no evidence of the response of the plaintiff to those notices. However, on 7 March 1996 (see PBA(61)), the plaintiff served notice on Ju-Ichi that any development of the said land by Ju-Ichi would be viewed as "unlawful interference (of the plaintiff's) legal rights" and that the plaintiff would "take whatever necessary legal action to prevent any interference or encroachment of the said land". Then on 9 April 1996 (see DB(6)) the plaintiff served notice on the defendant to honour the said agreement. It would appear that the parties met on 23 July 1996 in an attempt to resolve their differences. Then on 25 July 1996 (see DB(8)) the plaintiff requested that all development works by Ju-Ichi "be stopped until an agreement is reached concerning the proposition made by the plaintiff". On 29 August 1996 (see DB(10)), the defendant replied that the defendant could not do so, as Ju-Ichi had been legally authorised by agreement with the state government to proceed with the development of the said land. By then, it should have been obvious to the parties that the said land would not be alienated to the defendant. But still the defendant pursued the matter. On 11 September 1996 (see DB(11)), the defendant complained to the Chief Minister's Office that there had been no reply to its application for the said land, and practically pleaded with the Chief Minister's office to facilitate the defendant to honour its agreement with the plaintiff. And on 13 May 1997 (see DB(14)], the Johore Economic Planning Unit notified Ju-Ichi that the Johore Government on 16 April 1997 had given approval to Ju-Ichi to erect a multi-storey car park on the said land which

would then be delivered by the state government to the defendant who could lease the multi-storey car park to the plaintiff. In short, there was no lack of effort on the part of the defendant to obtain the title to the said land.

[37] The plaintiff contended that it was the obligation of the defendant to obtain the title to the said land. Suffice it to say that although cl. 11 contained an undertaking by the defendant to forward the document of title, when issued, to the plaintiff for the purpose of registration of the agreed lease, there was no expressed provision that it was the obligation of the defendant to obtain the title to the said land. But given the surrounding circumstances and objects of the said agreement, could such an obligation be constructed? What would have been the intention of reasonable persons in the position of the plaintiff and defendant? "Each case must be decided on the specific terms of the relevant ... agreements and based upon its own peculiar facts" (*Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337 per Abdul Kadir Sulaiman). The said land was state land (see DB(16)) even though it was earmarked by the defendant as a car-park reserve. The entire property of the said land was vested solely in the State Authority (see s. 40 of the National Land Code). The defendant could apply for the said land, but only the State Authority had the power of alienation (see s. 41 read together with s. 42 of the NLC). Clause 11 clearly alluded to the fact that the said land had yet not been alienated to the defendant. Notice was given that the defendant was yet not the proprietor of the said land. But given that the power of alienation was with the State Authority and not at all with the defendant, could it be believed that the defendant could have assumed the obligation to obtain the title to the said land? A reasonable person in the position of the defendant would not have assumed that obligation. And a reasonable person in the position of the plaintiff could not have expected the defendant to assume that obligation. "In a purely commercial transaction such as the one we have here, the correct approach is to interpret the agreements in a way that is consonant with business common sense. As Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 at 201 '... if a detailed and syntactical anaylsis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense'" (*Mars Equity Sdn. Bhd. v. Tis 'Ata'ashar Sdn Bhd* [2005] 1

CLJ 513, per Gopal Sri Ram JCA.). "... in any construction of any contract, the reasonableness of the result of such construction is the predominant consideration" (*Equity Corporation Sdn Bhd v. Thye Sun Quarry Sdn Bhd* [2002] 6 MLJ 74, per Zulkefli J, as he then was). In the instant case, the defendant was in no position to warrant that no matter what the title would be obtained, and any conclusion that the defendant had the obligation to obtain the title would flout business common sense. The more reasonable result would be that the defendant had the obligation to apply for the said land.

[38] Given the factual background, it was not at all certain that title to the said land would indeed be obtained by the defendant. And so it was that there was no warranty, be it expressed or could be construed, in the said agreement that title would be obtained by the defendant. And given that the power to alienate was with the State Authority over which the defendant had no control, there was the ever present possibility or even probability that the defendant would not obtain title to the said land. Even so, the said agreement failed to provide for that eventuality. Perhaps, it was because it was not necessary to state the obvious. As said, what was agreed was a lease that would be effective if the defendant has obtained the title to the said land. Title must be obtained before the lease could be effective.

[39] Title was not obtained. The stipulated event had not happened. What was the effect upon the said agreement of the title not being obtained? The following authorities are instructive.

[40] In *Aberfoyle Plantations v. Khaw Bian Cheng* [1960] 1 MLJ 47, Aberfoyle agreed to sell some 1,336 acres of rubber plantations, to Khaw Bian Cheng. At the date of the agreement the vendor had a good title to 1,154 acres, but its title to the other 182 acres depended on the renewal of seven previously expired leases. The agreement provided "the purchase is conditional on the vendor obtaining ... a renewal of the seven leases ... so as to be in a position to transfer the same to the purchaser ... and if for any cause whatsoever the vendor is unable to fulfill this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits already made". That condition remained unfulfilled, and the purchaser brought an action for the return of the deposits. It was held by the Privy Council that the purchaser was entitled to the return of his deposits because, on the true construction of the

agreement, the condition of the renewal of the leases had to be fulfilled at latest by 30 April 1956 (extended by consent to 31 May 1956), and the contract did not allow the vendor a further reasonable time after that date to perform the condition although some delay in the actual execution of the transfer might be allowable by virtue of the words "as soon as possible thereafter" in cl. 9 if the renewal of the leases had been obtained within due time.

[41] In *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282, the respondents agreed to sell and the appellants agreed to buy certain immovable properties, with the condition that the sale shall be subject to the approval of the Foreign Investment Committee. The FIC refused its approval. The agreement was silent on the effect upon the agreement of the non-approval of the FIC but contained a proviso that "all monies paid by the purchaser hereunder shall be returned to the purchaser in the event that such approval as aforesaid is not given by the FIC". Dismissing the appeal, the Federal Court per Salleh Abbas CJ (Malaya) as he then was, held that the result would not be different whether the requirement of FIC approval was a contingent condition as in *Aberfoyle*'s case or a mere promissory condition as in *Property and Bloodstock*'s case, as in the first case there was no agreement to enforce until the requirement was satisfied whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is the non-fulfilment of the requirement (see also *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259). The Federal Court took the opportunity to enunciate not only on a contingent condition as opposed to a promissory condition, but also on the word "condition" and on s. 57(2) of the Contracts Act 1950.

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. Until the FIC approval was given liability for

further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by section 33(a) of the Contracts Act which enacts:

> 33. (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:

> 33. (b) If the event becomes impossible, such contracts become void.

We draw much support from *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] MLJ 47 which we think is on all fours with the case under the present appeal; the only difference being that in *Aberfoyle*'s case the parties expressly agreed that in the event of the non-fulfilment not only was the purchaser entitled to the refund of the deposit but that the agreement itself would become null and void. Whereas in the case under the present appeal the parties made no reference at all to the voidness or nullity of the agreement. This silence, in our view, is of no consequence because it is implicit that the validity or otherwise of the agreement depends entirely upon the general principle of the law of contract relating to the nature and effect of this sort of stipulation.

Although many judges dislike the use of the word "condition" because the word is susceptible to a number of senses in which it can be used, authorities have nevertheless established that there are at least two senses in which the word is used. First, it is used in the sense of a condition as opposed to a warranty. Secondly, it is used in the sense of a contingent condition (precedent or subsequent) as opposed to a promissory condition. (See *Anson's Law of Contract*, 24th ed. pp. 130-134). In so far as this appeal is concerned, we are not concerned with the first sense but only with the second meaning. The question is therefore whether the requirement as to FIC approval for completion of the proposed sale is a contingent condition or a promissory condition. A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in

damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

In *Aberfoyle*'s case *(supra)* a condition in a sale agreement that the completion of the sale of the land was conditional upon the vendor obtaining the renewal of the lease which was the subject matter of the sale from the State Government was held by their Lordships of the Privy Council to be a contingent condition and not a promissory condition. We confess we cannot see any difference between this condition and the requirement for FIC approval in the case under the present appeal. To us the requirement belongs to the category of contingent conditions the non-fulfilment of which negates the existence of any contractual relationship between the parties to complete the agreement.

In the case of *Property and Bloodstock Ltd. (supra)*, however, the Court of Appeal in England as regards somewhat similar condition reached a different conclusion. In that case a sale agreement between the vendor and the purchaser was made subject to the vendor obtaining the consent of the landlord to the assignment of the lease, which was the subject matter of the sale to the purchaser.

...

However, even if we hold that the requirement as to FIC approval is no more than a term – essential term of the agreement, the result would still be the same. If it is a mere term of the contract the non-approval by FIC of the deal certainly defeats the sale because such an approval would then constitute a supervening event rendering the contract void under section 57(2) of the Contracts Act.

This view was in fact expressed by Lord Danckwerts in *Property & Bloodstock*'s case *(supra)* when he said:

> Of course, if the necessary consent by the landlords to the assignment cannot be obtained, it defeats the sale, but this is a supervening event. (p. 329C)

Thus in so far as the principal issue is concerned whether we hold the requirement as to FIC approval is a contingent condition as in *Aberfoyle*'s case or as a mere promissory condition – ie, mere term of the agreement as in *Property and Bloodstock*'s case *(supra)* the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the

agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract, it was, however, defeated or frustrated by a supervening event, which is the non-fulfilment of the requirement, and in this case also the deposit was refundable as money held and received for the use of the appellants who paid it (see section 15(2) of Civil Law Act).

[42] In *Royal Selangor Golf Club v. Anglo-Oriental (Malaysia) Sdn. Bhd (supra)*, the plaintiff who was the registered proprietor of a piece of land, by a memorandum of lease executed in 1949 agreed to lease to the defendant a part of the land described as lot 1 for a term of 30 years with effect from 1 May 1949. Under s. 47 of the Land Code (Cap 138) which was in force at that time, the maximum duration of any lease in respect of land was 30 years. The memorandum of lease was presented for registration on 7 June 1949 and on the same day a second agreement was executed by the parties. Clause 2 of the second agreement provided that if and when the Land Code (Cap 138) was amended to permit the plaintiff to grant to the defendant a lease for 99 years, the plaintiff will, "subject to the consent thereto being obtained" of any person or persons whose consent thereto was required by virtue of the terms and conditions under which the plaintiff held the land, grant to the defendant a lease for 99 years of the land described in the original lease and upon the same rental terms and conditions as the original lease. The plaintiff sought a declaration that upon the proper construction of the two agreements, the lease of lot 1 should be for a term of 30 years commencing from 1 May 1949 and expiring on 30 April 1979 and also a declaration that the defendant was trespassing on lot 1 and that the plaintiff was entitled to vacant possession of the same. It was contended for the plaintiff that since the Land Code (Cap 138) had been repealed and replaced by the National Land Code 1965 which did not provide for the grant of a 99-year lease in respect of lot 1, the contingent event stipulated in cl. 2 of the second agreement had become ineffective and impossible to perform. The case for the defendant was that since sub-s (3)(a) of s. 221 of the Code allowed the plaintiff to lease out the whole of the land held under the existing document of title, the plaintiff should apply to the Land Administrator to sub-divide the land in such a way as to enable a separate document of title to be issued in respect of lot 1, thereby enabling the defendant to have a 99-year lease over lot 1. Alternatively, the defendant claimed that the

plaintiff should at least grant the defendant a 30-year lease under sub-s (3)(b) of s. 221 of the Code with extension up to a period of 99 years as stipulated in cl. 2 of the second agreement. The defendant also contented that the words 'subject to the consent thereto being obtained' in cl. 2 of the second agreement indicated that the plaintiff must take steps to get the approval of the Land Administrator to sub-divide the land. Granting the declaration, Lim Beng Choon J held:

> Applying the legal principles discussed above to the present case, it is necessary to examine carefully the wordings of cl 2 of the second agreement. It will facilitate the detection of the meaning of the said cl 2 when that clause is abridged to only the essential wordings and omitting the parenthesized remarks. The abridged form of the clause will then read as follows:
>
> That if and when the Land Code (Cap 138) is amended to permit the club to grant to the company a lease for 99 (ninety-nine) years the club will, ... grant to the company a lease for 99 (ninety-nine) years of the land described in the original lease ...
>
> The words which I have emphasized can only mean that if, and only if, the Land Code was amended to permit the plaintiff to grant to the defendant a lease of 99 years in respect of lot 1 referred to in the original memorandum of lease, then and only then, would the plaintiff be obliged to grant the defendant a lease of 99 years' duration. No other meaning of the words used is conceivable.
>
> Now sub-s (3)(a) of s 221 of the National Land Code 1965 allows a grant of a lease of 99 years only in respect of the whole of any alienated land. Where a lease relates to a part only of the whole land, the maximum duration of the lease allowed is only 30 years (see sub-s 3(b) of the said s 221). To my mind, it is clear that the land law has not been amended in such a way as to permit the plaintiff to grant to the defendant a 99-year lease in respect of lot 1, that is to say the portion of the land described in the original memorandum of lease. That being the case, the contingent event stipulated under cl 2 of the second agreement has become impossible to perform.

[43] In *Multi-Purpose Holdings Bhd v. Ketua Penqarah Hasil Dalam Negeri* [1997] 4 CLJ 457, the agreement dated 6 July 1984 for the transfer of shares was conditional upon approval by the government and regulatory authorities. The appellant applied for and obtained the approvals. However, the Special Commissioners of the Income Tax decided that the Share (Land Based

Company) Transfer Tax Act 1984 ('the STTA'), as amended by the Finance (No 2) Act 1985 ('Act 323'), and brought into force on 19 October 1984, applied to the appellant's disposal of shares which was deemed to have taken place on 8 November 1984, the date when the government's approval was obtained and directed that the assessment of RM15,147,847.10 as share transfer tax be confirmed. The issue before the High Court was whether the STTA as amended by Act 323 which came into force on 19 October 1984 applied to the appellant's disposal of the shares pursuant to the agreement, at which time the STTA had yet not been enacted. It was contended that the STTA did not have any application to the appellant's disposal of the shares as the disposal was already a completed transaction on 6 July 1984 under the agreement and any attempt to determine the disposal date by reason of the agreement would be contrary to law by reason of giving retrospective effect when no express statutory provision has been made in regard to completed transaction, ie disposal; that the proviso to s. 5 of the STTA should not be interpreted so as to enlarge the disposal prior to 19 October 1984; and that the Foreign Investment Committee's letter dated 3 October 1984 was the approval and the only authority that was referred to in s. 5. Dismissing the appeal, Nik Hashim JC, as he then was, said:

> It is clear that the agreement which the appellant executed on 6 July 1984 is a contingent agreement by virtue of s. 33(a) of the Contracts Act 1950. The parties by cl. 3 of the agreement have entered into a contract for the sale of the shares conditional upon the approval of the transaction by the government over which the parties had no control. Until the government approval was given, the agreement could not be said to be a completed and enforceable transaction (*National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 MLJ 211). Thus, as at 6 July 1984, the agreement for the disposal of the shares was not yet a completed transaction as the agreement is subject to the approval by the government.

[44] Perhaps closest on facts to the present case is *Halimah binti Abdul Rahman v. Fatimah binti Abdullah* [1976] 2 MLJ 64, where the respondent who had been given a surat akuan applied for a surat putus kechil. She was granted this but the surat putus kechil was subsequently cancelled for non-payment of quit rent and the land reverted to the State. The respondent subsequently reapplied for the land. Soon after that, she agreed to sell the land to the appellant, making it clear in the agreement that she was not its

owner but had applied to the State for the land and promising to complete the deal after she obtained title from the State. The appellant paid $300 towards the purchase price and went into occupation of the land. After the respondent obtained the necessary document of title, the appellant asked her to complete the sale but she refused to do so. The appellant thereupon applied for specific performance. This was refused in the High Court on the ground that as the land had reverted to the State the agreement offended against s. 195 of the Kedah Land Enactment relating to unlawful occupation of State land. On appeal, the Federal Court per Ali FJ held that the appellant's claim should have been allowed as this was not an outright sale but a conditional sale to be completed when the vendor's application was approved by the State, and that the contract in this case was clearly enforceable in law.

> The vendor, Fatimah, in answer to the purchaser's statement of claim pleaded various grounds in support of her contention that the agreement is void ... In paragraph 3 she pleaded that since at the time of the agreement the land was State land she had no *locus standi* in respect of the land. In other words, the agreement is void because she had no title. This was argued at the hearing but was not considered by the learned trial judge. In any case I can see no merit in the argument in view of what is stated by S.K. Das in his book on the Torrens System in Malaya. On page 358 the learned author wrote:
>
> > ... If a vendor having neither a title nor the power to obtain a title contracts to sell land and subsequently before the date fixed for completion he acquires power to call for title the purchaser can force him to complete. The fact that at the date of the contract the vendor had neither title nor power to call for title is of itself no answer to a suit for specific performance by either party: *Brickies v. Shell* [1916] 2 AC 599.
>
> In my view section 33(a) of the Contracts Act, 1950 also answers the question. It provides:
>
> > Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> A clear implication of the provision is that a contract such as in the instant case is enforceable in law.

A …

The question is whether the consideration or object of the agreement was possession or occupation of the land or something else. The answer lies in that portion of the agreement which reads thus:

B

> ... My agreement Fatimah with Halimah is that when the Government issue the documents of title on the said land then at that time, I, Fatimah undertake to transfer to the name of Halimah binti Abdul Rahman and all expenses payable at the time I, Fatimah undertake to pay.

C

My reading of this portion of the agreement is that the promise by the respondent, Fatimah, was to execute a transfer as and when she is issued with the document of title.

D Suffian LP added "that the purchaser's claim should have been allowed, because the sale here was not an out-right sale, but a conditional sale, to be completed when the vendor's application has been approved by the State. Just as it is legal for some one to sell rubber which he does not have but which he plans to buy and own on a future date, when it is to be delivered, so it is in

E my opinion equally legal for some one to sell State land on condition that the deal will be completed if and only if the vendor's application for the land has been successful and the State has issued a title to him".

F **[45]** It boils down to this. A contingent condition is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, the non-fulfilment of which does not render either party liable in damages to the other, whilst a promissory condition, on the other hand, is an essential

G term of the contract, the breach of which entitles the innocent party to treat itself as discharged from the contract and to sue for damages, but not in the case where the subsisting agreement is defeated or frustrated by a supervening event which is the non-fulfilment of the promissory condition *(National Land Finance)*. And

H on the true construction of the said agreement when read as a whole, there was no out-right lease. The lease was entirely dependent on an uncertain future event. The lease could only take effect if the defendant has obtained the title to the said land. The defendant had not obtained the title to the said land, and in the

I upshot there was no enforceable agreement. The result would not be any different even if it were that the requirement of the title

was a promissory condition; the said agreement was defeated or frustrated by the non-fulfilment of a requirement that worked out to be that the defendant must first obtain the title to the said land. The defendant had not prevented the fulfilment of that requirement. Where it could, the defendant had duly carried out the provisions of the said agreement, as in the delivery of the said land for the open-air car-park. The defendant had not breached the said agreement. It was just that the said agreement in relation to the lease was impossible to perform. Accordingly, the defendant could not be liable in damages to the plaintiff.

For those reasons, this action is dismissed with costs.